



## MEMORANDUM

TO: State Board of Education

FROM: Bernice A. N. Corley, General Counsel – Department of Education

RE: Use of Electronic means to participate in meetings

DATE: July 9, 2013

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Provisions within the Open Door Law (ODL) and the Access to Public Records Act (APRA) permit state agencies such as the State Board of Education ("Board") to allow its members to attend meetings via electronic means. In order for the Board to permit electronic participation in a meeting, by a Board member, the Board would have to adopt a policy to this effect. Below is guidance on actions the Board must take, followed by actions that the Board may take in implementing an e-participation policy. There is also analysis of pertinent provisions of the electronic participation law to assist the Board.

The Board is authorized to develop such a policy through Ind. Code §§ 5-14-1.5-2(a)(1), 5-14-1.5-3.6. The following would be required of such a policy:

1. At least four (4) members would have to be physically present at the designated meeting site. The exact number depends upon the language. See the analysis. (By policy, the Board could increase the number of those who must be physically present but the Board cannot decrease the number.)
2. A Board member participating via electronic means can do so by telephone, computer, video conferencing, or any other method of communication that allows for simultaneous communication and is capable of being recorded by members of the public.
3. Where at least one (1) Board member is participating via electronic means, all votes must be taken by roll call.
4. Each Board member must physically attend at least one (1) Board meeting a year. (By policy, the Board could increase this number but not excuse or waive it.)
5. A Board member appropriately participating via electronic means is considered present and may vote at the meeting. (By policy, the Board could provide otherwise, restricting the extent of participation or the effect of the votes of a Board member participating via electronic means.)

The following would be discretionary considerations for such a policy:

1. Require a Board member participating via electronic means to do so at a place open to the public so that members of the public can be present to observe and record the proceedings.

2. Require a Board member to obtain prior authorization before participating via electronic means.
3. Limit the number of Board members who may participate in a meeting via electronic means.
4. Limit the number of Board meetings in a calendar year where a Board member could participate via electronic means.
5. Restrict the effect of the vote of a Board member participating via electronic means such that the member not physically present could not cast the “deciding vote” in a matter or could not vote unless a specific number of members who were physically present concurred with the physically absent member’s vote.
6. Require the Board member participating via electronic means to provide written confirmation of the member’s vote(s) within a certain number of days following the meeting.
7. Require a “quorum” of Board members to be physically present (see analysis).

Establish any other procedures, limitations, or conditions that govern participation by a Board member via electronic means provided that such additional procedures, limitations, or conditions not conflict with statute.

Indiana Code Provision	Requirements	Considerations
<p>IC 5-14-1.5-3: (a) Except as provided in section 6.1 of this chapter [Executive Sessions], all meetings of the governing bodies of public agencies must be open at all times for the purpose of permitting members of the public to observe and record them.</p> <p>(b) A secret ballot vote may not be taken at a meeting.</p> <p>(c) A meeting conducted in compliance with section 3.5 or 3.6 of this chapter or <u>any other statute that authorizes a governing body to conduct a meeting using an electronic means of communication does not violate this section.</u> ...</p>	<p>The State Board of Education (“Board”) is an eleven-member body. I.C. 20-19-2-2. The statute states that a quorum consist of six (6) members and, that it takes the vote of six (6) members for the Board to take official action.</p>	<p>There is a certain dynamic that is present when Board members are physically present. This is more difficult to establish when some members are present and others are participating via electronic means, especially electronic means that does not allow for video contact.</p> <p>However, the Board has, in the recent past, found it challenging to set meeting dates due to a lack of members who can be physically present to create a quorum. An E-participation policy would provide the Board some flexibility.</p>
<p>IC 5-14-1.5-3.6: (a) This section applies only to a governing body of a public agency of the state, including a body corporate and politic established as an instrumentality of the state.</p>	<p>Provision I.C. 5-14-1.5-3.6(a) indicates that it applies to a “public agency of the state.” This would include the Board, which falls within the definition of a “public agency” in I.C. 5-14-1.5-2(a)(1) of the Open Door Law.</p>	<p>I.C. 5-14-1.5-3.6 does not require a “public agency of the state” to allow members to meet via electronic means. The Board has the discretion to do so (provided conditions precedent are satisfied).</p>
<p>IC 5-14-1.5-3.6: (b) A member of the governing body of a public agency who is not physically present at a meeting of the governing body may participate in a meeting of the governing body by electronic communication only if the member uses a means of communication that permits:</p> <p>(1) the member;</p>	<p>Should the Board decide to develop a policy that would permit a member or members to attend a Board meeting via electronic means, there are certain features that <u>must</u> be included in that policy. I.C. 5-14-1.5-3.6(b) establishes some of the required provisions:</p> <ul style="list-style-type: none"> <li>✓ The means of electronic participation used by the physically</li> </ul>	<p>These provisions are not a neat fit with the existing (and continuing) requirement under I.C. 5-14-1.5-3 that requires public agencies to conduct open meetings such that members of the public can both “observe” and “record” the proceedings. Depending upon the electronic means employed, members of the public may not be able to “observe” the physically absent</p>

<p>(2) all other members participating in the meeting;</p> <p>(3) all members of the public physically present at the place where the meeting is conducted; and</p> <p>(4) if the meeting is conducted under a policy adopted under subsection (g)(7), all members of the public physically present at a public location at which a member participates by means of electronic communication; to simultaneously communicate with each other during the meeting.</p>	<p>absent member must allow for simultaneous communication among Board members;</p> <p>✓ The means of electronic participation used by the physically absent member must allow for members of the public who are present at the Board meeting site to hear or record the participating member not physically present (I.C. 5-14-1.5-3(a) requires all public meetings to be open at all times—except for executive sessions—so that members of the public can observe the proceedings and record them; this does not provide members of the public the opportunity to speak unless the Board provides such an opportunity).</p> <p>✓ Depending upon the policy the Board adopts, should the Board require physically absent members who participate via electronic means to do so in a place open to the public, members of the public at the site should be able to hear and record the Board meeting and communicate with the Board, if permitted or required.</p>	<p>member.</p> <p>I.C. 5-14-1.5-3.6 does not define what the legislature means by “electronic communication.” In the companion statute for political subdivisions, I.C. 5-14-1.5-3.5, the legislature refers to a member participating in a meeting “by telephone, computer, video conferencing, or any other means of communication[.]” I.C. 5-14-1.5-3.5(b). In the absence of any definition or definitive boundaries on what the legislature means by “electronic communication,” the Board could rely upon this list as an indication of legislative intent.</p>
<p>IC 5-14-1.5-3.6: (c) The governing body must fulfill both of the following requirements for a member of the</p>		

<p>governing body to participate in a meeting by electronic communication:</p> <p>(1) ... The minimum number of members who must be physically present at the place where the meeting is conducted must be the greater of:</p> <p>(A) two (2) of the members; or</p> <p>(B) one-third (1/3) of the members.</p> <p>(2) All votes of the governing body during the electronic meeting must be taken by roll call vote.</p> <p>Nothing in this section affects the public's right under this chapter to attend a meeting of the governing body at the place where the meeting is conducted and the minimum number of members is physically present as provided for in subdivision (1).</p>	<p>For the Board, as an eleven-member Board, the minimum number of Board members who must be physically present at the meeting site would be four (4) [<math>11 \times \frac{1}{3}</math> rounded off], assuming the Board adopts a policy for member participation via electronic means. I.C. 5-14-1.5-3.6(c)(1) (A),(B).</p> <p>Where at least one (1) member is participating via electronic means, all votes must be by roll call. I.C. 5-14-1.5-3.6(c)(2).</p>	<p>The roll-call requirement would apply even if the electronic means did provide real-time video as well as audio. Statute does not limit roll-call votes to any category (such as adjudications). As a result, this requirement would apply to all votes of the Board, including approval of the agenda or minutes from a past meeting.</p>
<p>IC 5-14-1.5-3.6: <b>(d)</b> Each member of the governing body is required to physically attend at least one (1) meeting of the governing body annually.</p>	<p>Although statute refers to “annually” without further qualification, the intent is “calendar year.” See I.C. 5-14-1.5-3.6(g)(3), (4), <i>infra</i>, and I.C. 1-1-4-5 (“Year” means “calendar year” unless otherwise expressed).</p>	<p>This is designed to ensure that there isn’t a member who, for whatever reason (perhaps convenience), never appears in person for a meeting of the public agency. This does pose a concern: There is no indication what the legal ramifications might be for adjudications where, after the calendar year, it is determined that a member participating via electronic means never appeared physically for a meeting.</p>
<p>IC 5-14-1.5-3.6: <b>(e)</b> Unless a policy adopted by a governing body under subsection (g) provides otherwise, a member who participates in a meeting by</p>	<p>The language is straight forward. It seems unlikely that any policy adopted by the Board would want to prevent a member who participates via electronic means to</p>	<p>This is a departure from past statutory provisions, which, in some cases, limited the use of this means of participation, including preventing members from</p>

<p>electronic communication:</p> <p>(1) is considered to be present at the meeting;</p> <p>(2) shall be counted for purposes of establishing a quorum; and</p> <p>(3) may vote at the meeting.</p>	<p>not be considered present or not be permitted to vote.</p> <p>The Board would not have to specifically mention that a member would be considered present and may vote. In the absence of any reference in the Board policy, the statute would establish this.</p>	<p>participating in any final action taken unless specifically authorized by statute to do so. This limitation is still applied to local political subdivisions under I.C. 5-14-1.5-3.5 but not to the Board.</p> <p>Even though statute establishes the status of a member participating via electronic means, and the Board would not have to reference this unless the Board wanted to qualify the status somehow, it is recommended the Board include this in its policy, if it adopts one.</p>
<p>IC 5-14-1.5-3.6 (f) A governing body may not conduct meetings using a means of electronic communication until the governing body:</p> <p>(1) meets all requirements of this chapter; and</p> <p>(2) by a favorable vote of a majority of the members of the governing body, adopts a policy under subsection (g) governing participation in meetings of the governing body by electronic communication.</p>	<p>This statutory provisions indicates the Board cannot, post January 1, 2013, allow a member to participate via electronic means unless it has complied with the requirements of “this chapter” (meaning the ODL, I.C. 5-14-1.5) and by adopting a policy (“by a favorable vote of the majority” meaning six affirmative votes of the Board).</p>	<p>Complying with “this chapter” would include, <i>inter alia</i>, the posting of the Board’s agenda, providing the requisite public notice, maintaining minutes of the meeting and making same available to the public upon request. See, generally, I.C. 5-14-1.5-4, I.C. 5-14-1.5-5.</p>
<p>IC 5-14-1.5-3.6 (g) A policy adopted by a governing body to govern participation in the governing body's meetings by electronic communication may do any of the following:</p>	<p>While the Board would have to adopt a policy in order to utilize participation of a member via electronic means, the Board is not required to do so. It is discretionary. The delineated considerations <i>infra</i> are also discretionary.</p>	
<p><b>(1) Require a member to request authorization to participate in a meeting</b></p>	<p>If the Board adopted this as a part of its policy, a time frame would have to be</p>	<p>A time frame is helpful, especially in providing for the necessary equipment that</p>

<p><b>of the governing body by electronic communication within a certain number of days before the meeting to allow for arrangements to be made for the member's participation by electronic communication.</b></p>	<p>established. Presumably, the request would have to be made of the chair (unless it is the chair who is making the request, then the chair would make the request of the secretary).</p>	<p>would meet the statutory requirement of “simultaneous communication” and the ability of the public to record. However, a strict time frame could inhibit the Board where the reason for absence is due to inclement weather or similar so-called Acts of God. Since this is a discretionary provision, the Board could elect (1) not to establish a time frame; (2) establish a strict time frame; (3) establish a time frame generally but recognize that emergencies may arise and utilize a more flexible time frame for such occasions; (4) leave the time frame generally open utilizing a “reasonable time” before the meeting but no later than _____ hours; or (5) use a “reasonable time” indicator with no qualifier. The notice provisions of the ODL have been amended as well (IC 5-14-1.5-4, 5), but the amendments do <u>not</u> require notifying the public that any member will be participating via electronic means.</p>
<p><b>(2) Subject to subsection (e), limit the number of members who may participate in any one (1) meeting by electronic communication.</b></p>	<p>Absent any policy statement by the Board, there would have to be at least four (4) Board members physically present at the meeting site.</p> <p>Under subsection (e), the Board could limit the role of a member participating via electronic means, including whether the member would be counted as present or permitted to vote on any final action.</p>	<p>As noted <i>supra</i>, limiting the role or function of a member participating via electronic means does not seem advisable. This may prove too limiting</p>



<b>(3) Limit the total number of meetings that the governing body may conduct in a calendar year by electronic communication.</b>	Self-explanatory, but, again, discretionary on the part of the Board.	
<b>(4) Limit the number of meetings in a calendar year in which any one (1) member of the governing body may participate by electronic communication.</b>	Self-explanatory but discretionary. The Board could establish a limited number of times a member could utilize the electronic participation method (with the understanding that a member <u>must</u> physically attend at least one meeting annually).	
<b>(5) Provide that a member who participates in a meeting by electronic communication may not cast the deciding vote on any official action.</b>	<p>This is also discretionary. It provides a disincentive to participate via electronic means.</p> <p>What constitutes a “deciding vote” could depend upon how the roll call is conducted.</p>	The Board could have valid reasons for establishing such a limitation (especially where credibility and demeanor are important in an adjudication and the member not physically present cannot assess these due to audio-only means of participation). Notwithstanding, this may be a limitation that inhibits the functioning of the Board, requiring parties to appear before it again at a later date.
<b>(6) Require a member participating in a meeting by electronic communication to confirm in writing the votes cast by the member during the meeting within a certain number of days after the date of the meeting.</b>	Self-explanatory and discretionary.	Does not seem practical, especially as there are official minutes maintained for all Board meetings where the vote is indicated. The Board could have its minutes reflect how votes by members were cast (physically present, participating via electronic means). Requiring a member to provide written confirmation post-meeting is not recommended.
<b>(7) Provide that in addition to the</b>	Discretionary. It would permit the public	Most Board members work in the private

<p><b>location where a meeting is conducted, the public may also attend some or all meetings of the governing body, excluding executive sessions, at a public place or public places at which a member is physically present and participates by electronic communication. If the governing body's policy includes this provision, a meeting notice must provide the following information:</b></p> <p><b>(A) The identity of each member who will be physically present at a public place and participate in the meeting by electronic communication.</b></p> <p><b>(B) The address and telephone number of each public place where a member will be physically present and participate by electronic communication.</b></p> <p><b>(C) Unless the meeting is an executive session, a statement that a location described in clause (B) will be open and accessible to the public.</b></p>	<p>to be present at the place where the member participating via electronic means is doing so. Members of the public could be present, observe, and record.</p> <p>If the Board adopted such a provision in its policy, its public notice would have to indicate which member(s) was participating in this fashion; the address and telephone number of the “public place” where the member would be physically present to participate via electronic means; a statement that the public place where the member will be located will be open and accessible to the public (unless this is an executive session under I.C. 5-14-1.5-6.1).</p>	<p>sector and not the public sector. Locating and arranging for electronic participation at a “public place” accessible to the public creates logistical difficulties, not only for the individual member(s) but for staff as well. Provides unnecessary opportunities to violate the ODL.</p>
<p><b>(8) Require at least a quorum of members to be physically present at the location where the meeting is conducted.</b></p>	<p>Again, this is discretionary.</p>	
<p><b>(9) Provide that a member participating by electronic communication may vote on official action only if, subject to subsection (e), a</b></p>	<p>This is another discretionary limitation that can be placed on the discharge of the duties of a member participating via electronic means.</p>	<p>This provides a disincentive to participate via electronic means, and gives greater leeway to members physically present to dilute the import of the participation and</p>

<p><b>specified number of members:</b>  <b>(A) are physically present at the location where the meeting is conducted; and</b>  <b>(B) concur in the official action.</b></p>		<p>decisions of the member not physically present.</p>
<p><b>(10) Establish any other procedures, limitations, or conditions that govern participation in meetings of the governing body by electronic communication and are not in conflict with this chapter.</b></p>	<p>This is a general clause allowing the Board to establish any other requirements, limitations, or disincentives on the functions of members participating via electronic means.</p>	<p>Example: IC 5-14-1.5-3.6(d) requires each member to “physically attend” at least one (1) meeting annually. It is not known what the legal effect would be on decisions made by the Board should a member who participated via electronic means failed to physically attend a meeting for the remainder of the year (resignation, illness, etc.). It would be better to establish that a member must have physically attended a meeting in the first quarter (or similar period) of the calendar year to ensure this requirement is met before granting leave to participate electronically the remainder of the year.</p>
<p>5-14-1.5-3.6: <b>(h)</b> The policy adopted by the governing body must be posted on the Internet web site of the governing body or the public agency.</p>	<p>Self-explanatory. Provision is applicable only if the Board adopts a policy regarding participation by a member via electronic means.</p>	

<p>IC 5-14-1.5-3.6: (i) Nothing in this section affects a public agency's right to exclude the public from an executive session in which a member participates by electronic communication.</p>	<p>Indicates that a member can participate in an executive session under I.C. 5-14-1.5-6.1 by electronic means. Provision also indicates that the right of the Board to exclude the public from an executive session has not been altered.</p>	
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